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No. 83-5878

In the Supreme Court of the United States

OCTOBER TERM, 1983

ALFRED B. SHAPIRO AND GREGORY J. WENTZ,
PETITIONERS,

v.

DRUG ENFORCEMENT ADMINISTRATION,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JOINT APPENDIX

JEROLD S. SOLOVY
BARRY SULLIVAN
J. DAVID FARREN
JENNER & BLOCK
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350
Counsel for Petitioners

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217
Counsel for Respondent

PETITION FOR CERTIORARI FILED DECEMBER 8, 1983.
CERTIORARI GRANTED APRIL 2, 1984.

BEST AVAILABLE COPY

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

DATE	FILINGS—PROCEEDINGS
3/11/82	Complaint filed in *Wentz v. Drug Enforcement Administration*, 82 C 88 (W.D. Wis.)
4/28/82	Complaint filed in *Shapiro v. Drug Enforcement Administration*, 82 C 243 (W.D. Wis.)
6/11/82	Defendant's Motion to Dismiss or for Summary Judgment and Memorandum in Support filed in *Wentz*
6/25/82	Affidavit of Russ Arslan filed by Defendant *Wentz*
7/06/82	Defendant's Motion to Dismiss or for Summary Judgment filed in *Shapiro*
7/27/82	Plaintiff's Cross-Motion for Summary Judgment, Memorandum in Support, and Affidavit of Gregory J. Wentz filed in *Wentz*
7/27/82	Plaintiff's Motion under *Vaughn v. Rosen* and Memorandum in Support filed in *Wentz*
7/27/82	Plaintiff's Amended Complaint filed in *Wentz*
8/04/82	Order and Opinion of the United States District Court for the Western District of Wisconsin denying Plaintiff's Motion under *Vaughn v. Rosen* filed in *Wentz*
8/06/82	Memorandum in Support of Motion to Dismiss or for Summary Judgment and Affidavit of Russ Arslan filed by Defendant in *Shapiro*
8/24/82	Defendant's Reply Brief filed in *Wentz*
8/27/82	Plaintiff's Cross-Motion for Summary Judgment and Memorandum in Support filed in *Shapiro*
8/27/82	Plaintiff's Motion under *Vaughn v. Rosen* filed in *Shapiro*
9/15/82	Plaintiff's Supplementary Memorandum filed in *Wentz*

DATE	FILINGS—PROCEEDINGS
10/08/82	Opinion and Judgment granting Defendant's Motions for Summary Judgment filed in *Wentz* and *Shapiro*
11/04/82	Plaintiffs' Notices of Appeal filed in *Wentz* and *Shapiro*
11/16/83	Opinion and Judgment filed by the United States Court of Appeals for the Seventh Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

Civil Action No. 82 C 88

GREGORY J. WENTZ

vs.

DRUG ENFORCEMENT ADMINISTRATION

[Filed Mar. 11, 1982]

COMPLAINT UNDER PRIVACY ACT

The complaint of Gregory J. Wentz, who resides in Adams County, Wisconsin, respectfully represents:

1.

This Court has jurisdiction over the subject matter of this litigation under the provisions of 5 U.S.C. 552a(g)(1) and 28 U.S.C. 1331.

2.

Made defendant herein is the Drug Enforcement Administration of the United States Department of Justice, an "agency" under the provisions of 5 U.S.C. 552a(a)(1) and 5 U.S.C. 552e.

3.

In or prior to September of 1980 the Drug Enforcement Administration initiated an investigation of Complainant which resulted in his arrest and conviction of various criminal violations of Title 21 of the United States Code.

4.

During the course of that investigation the Drug Enforcement Administration compiled an extensive file on the Complainant.

5.

Commencing on May 29, 1981, Complainant has made numerous requests of the Drug Enforcement Administration for disclosure of his investigative file and all other information concerning him that might be in the custody of that Agency.

6.

Complainant has provided the Agency with all information and documents it has demanded for the purpose of complying with his request.

7.

Despite Complainant's repeated requests and cooperation, the Agency has provided no documents or records whatsoever to Complainant.

8.

The Drug Enforcement Administration has not claimed or asserted that any of the records or documents sought are subject to the exemption provisions of the Privacy Act and the Freedom of Information Act.

9.

Complainant is entitled to a permanent injunction under the provisions of 5 U.S.C. 552a(g)(3)(A) and F.R.C.P. 65, enjoining the Agency from withholding the documents or records and ordering the production of such documents or records to Complainant.

10.

Costs should be assessed against the United States and reasonable attorney's fees should be awarded to the Complainant under the provisions of 5 U.S.C. 552a(g)(3)(B).

11.

Complainant is incarcerated in the Federal Correctional Institution at Oxford, Wisconsin, and is without means to

pay any costs of court in advance or as they accrue, or to furnish security therefor or to retain an attorney to represent him in these proceedings and therefore, requests that the Court appoint an attorney to represent him and allow him to litigate this civil action in forma pauperis. An Affidavit of Indigency is attached hereto and made a part hereof.

WHEREFORE, Complainant prays:

I. That a permanent injunction issue herein enjoining the Drug Enforcement Administration from withholding all records and documents pertaining in any way to Complainant, Gregory J. Wentz, and ordering the production of such records and documents to him;

II. That there be a judgment herein assessing all costs of this civil action against the United States and awarding the Complainant reasonable attorney's fees for the prosecution of this action;

III. That an order issue herein granting Complainant permission to litigate this civil action without payment of the costs of court in advance, or as they accrue or furnishing security therefor and appointing an attorney at law to represent the Complainant in this matter.

/s/ Gregory J. Wentz
GREGORY J. WENTZ
04260-059
P.O. Box 1000
Oxford, Wisconsin 53952

GREGORY J. WENTZ, being first duly sworn, deposes and says that he has written the above and foregoing *Complaint under Privacy Act*, knows the contents thereof, and that the same is true to the best of his knowledge, information and belief.

/s/ Gregory J. Wentz
GREGORY J. WENTZ, pro se

Subscribed and sworn to before me this 18th day of January, 1982, at Oxford, Wisconsin.

/s/ Annette B. Kittmann
Notary Public

[SEAL]

THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

Civil Action No. 82 C 243

ALFRED B. SHAPIRO

vs.

DRUG ENFORCEMENT ADMINISTRATION

[Filed Apr. 28, 1982]

COMPLAINT UNDER PRIVACY ACT

The Complaint of Alfred B. Shapiro, who resides in Adams County, Wisconsin, respectfully represents:

1.

This Court has jurisdiction over the subject matter of this litigation under the provisions of 5 U.S.C. 552a(g)(1) and 28 U.S.C. 1331.

2.

Made defendant herein is the Drug Enforcement Administration of the United States Department of Justice, an "agency" under the provisions of 5 U.S.C. 552a(a)(1) and 5 U.S.C. 552e.

3.

In or prior to August of 1980 the Drug Enforcement Administration initiated an investigation of Complainant which resulted in his arrest and conviction of various criminal violations of Title 21 of the United States Code.

4.

During the course of that investigation the Drug Enforcement Administration compiled an extensive file on Complainant.

5.

Commencing in October of 1981, Complainant has made numerous requests of the Drug Enforcement Administration for disclosure of his investigative file and all other information concerning him that might be in the custody of that agency.

6.

Complainant has provided the agency with all information and documents it has demanded for the purpose of complying with his request.

7.

Despite Complainant's repeated requests and cooperation, the agency has provided no documents or records whatsoever to Complainant.

8.

The Drug Enforcement Administration has not claimed or asserted that any of the records or documents sought are subject to the exemption provisions of the Privacy Act and the Freedom of Information Act.

9.

Complainant is entitled to a permanent injunction under the provisions of 5 U.S.C. 552a(g)(3)(A) and F.R.C.P. 65, enjoining the agency from withholding the documents or records and ordering the production of such documents or records to Complainant.

10.

Costs should be assessed against the United States and reasonable attorney's fees should be awarded to the Complainant under the provisions of 5 U.S.C. 552a(g)(3)(B).

11.

Complainant is incarcerated in the Federal Correctional Institution at Oxford, Wisconsin and is without means to

pay any costs of court in advance or as they accrue or to furnish security therefor and requests that the Court allow him to litigate this civil action in forma pauperis. An affidavit of indigency is attached hereto and made a part hereof.

WHEREFORE, Complainant prays:

I. That a permanent injunction issue herein enjoining the Drug Enforcement Administration from withholding all records and documents pertaining in any way to Complainant, Alfred B. Shapiro, and ordering the production of such records and documents to him;

II. That there be judgment herein assessing all costs of this civil action against the United States and awarding the Complainant reasonable attorney's fees for the prosecution of this action;

III. That an order issue herein granting Complainant permission to litigate this civil action without payment of the costs of court in advance, or as they accrue or furnishing security therefor.

/s/ Alfred B. Shapiro
ALFRED B. SHAPIRO
05158-035
P.O. Box 1000
Oxford, Wisconsin 53952

U.S. DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

Civil Action #82-C-88

GREGORY J. WENTZ, PLAINTIFF

v.

DRUG ENFORCEMENT ADMINISTRATION, DEFENDANT

[Filed Jun. 25, 1982]

AFFIDAVIT OF RUSS ARSLAN

I, Russ Arslan, being duly sworn, depose and say as follows:

1. I am the Chief of the Freedom of Information Division of the Drug Enforcement Administration (DEA). As such, I am officially responsible for initially granting or denying requests made pursuant to the Freedom of Information/Privacy Acts (FOIA/PA), as amended (5 USC 552 and 5 USC 552a), respectively.

2. I am familiar with the complaint filed by the Plaintiff in which the Plaintiff made a request, pursuant to the Freedom of Information Act, that DEA disclose certain documents.

3. By letter dated May 29, 1981, pursuant to the provisions of the Freedom of Information and Privacy Act, the Plaintiff requested ". . . a copy of my entire DEA file, most especially the information compiled during the investigation initiated in September, 1980, primarily in the state of North Dakota." A true and correct copy of the Plaintiff's letter of May 29, 1981 is attached hereto as Exhibit A.

4. By letter dated June 8, 1981, DEA informed the Plaintiff that his request had been assigned Deficient Request number, DR-1-207-P, and further that the requester's complete name and date and place of birth must be furnished to ensure an accurate search of DEA records. A true and correct copy of DEA's letter of June 8, 1981, is attached hereto as Exhibit B.

5. By letter dated June 11, 1981, the Plaintiff forwarded a complete copy of an Identity Verification form along with his Social Security number to DEA. A true and correct copy of the Plaintiff's June 11, 1981, letter is attached hereto as Exhibit C.

6. By letter (and attachment) dated July 28, 1981, to the DEA Office, Fargo, North Dakota, the Plaintiff informed DEA of his desire for access to certain specific documents (which if in existence, would be discovered during the search pursuant to his May 29, 1981, request). A true and correct copy of the Plaintiff's July 28, 1981 letter is attached hereto as Exhibit D.

7. By letter dated August 27, 1981, the Plaintiff informed DEA of alleged non-action regarding the Plaintiff's request to the DEA Office in Fargo, North Dakota. A true and correct copy of the Plaintiff's August 27, 1981 letter is attached hereto as Exhibit E.

8. By letter dated August 18, 1981, the Plaintiff informed DEA that "It is now nine weeks since I complied with your request for identification and I have not received the information I requested." A true and correct copy of the Plaintiff's August 18, 1981 letter is attached hereto as Exhibit F.

9. By letter dated September 10, 1981, DEA informed the Plaintiff that his request will be handled in chronological order based on the date of its receipt. In addition, DEA assigned the Plaintiff's request number 81-802-P. A true and correct copy of DEA's letter of September 10, 1981, is attached hereto as Exhibit G.

10. By memorandum dated November 24, 1981, the Executive Office for United States Attorneys (EXOUSA) forwarded the Plaintiff's June 16, 1981 request to the EXOUSA and 46 pages of DEA criminal investigative reports containing information about the Plaintiff to DEA. A true and correct copy of the EXOUSA's memo of November 24, 1981, is attached hereto as Exhibit H.

11. By letter dated December 16, 1981, DEA informed the Plaintiff that the EXOUSA had located documents originated by DEA while processing the Plaintiff request to the EXOUSA, and that these documents were forwarded to DEA. A true and correct copy of DEA's letter of December 16, 1981, is attached hereto as Exhibit I.

12. On March 17, 1982, a Complaint and Summons were filed with the U.S. District Court for the Western District of Minnesota regarding the Plaintiff's request. A copy of the Summons and Complaint were received by DEA's Freedom of Information Division on March 23, 1982.

13. By letter dated April 19, 1982, the Plaintiff was notified that the search for all the documents relating to him had been completed and the Defendant further advised the Plaintiff that there were no documents available to him because of the restrictive provisions of the Privacy Act of 1974. A true and correct copy of the Defendant's April 19, 1982, letter is attached hereto as Exhibit J.

14. I have reviewed the Plaintiff's May 29, 1981, request and have decided that the Privacy Act prohibitions relied upon in DEA's determination letter of April 19, 1982, are applicable in response to the Plaintiff's request. Any reference to the Plaintiff, which may be responsive to the request, cannot be released.

15. I hereby verify that each and every reference to the Plaintiff found in DEA records systems is subject to exemption (j) (2) of the Privacy Act (5 USC 552a) and

further, that said references are contained in criminal investigatory files which are located in a system of records that has been properly exempted as published in the Department of Justice Regulations cited at 28 CFR 16.98 et seq.

16. Accordingly all references to the Plaintiff have been properly withheld pursuant to the Privacy Act 5 USC 552a exemption (j)(2) and to the Freedom of Information Act, 5 USC 552 exemption (b)(3).

17. It is unnecessary to provide the Plaintiff with a detailed justification of each and every additional FOI exemption that may be applicable on the basis that the (j)(2) exemption and the (b)(3) exemption are first and foremost categorically restrictive statutes prohibiting disclosure and therefore reference to the Plaintiff are not subject to discretionary release.

18. The subject of this Affidavit and the statements set forth herein are within my official purview and are true and correct to the best of my information, knowledge and belief.

/s/ Russ Arslan
RUSS ARSLAN
Chief
Freedom of Information Division
Drug Enforcement Administration
Department of Justice

Sworn and subscribed to before me this 22nd day of April, 1982.

/s/ Katherine L. Webster
Notary Public

My Commission Expires January 14, 1987

[SEAL]

EXHIBIT A

P.O. BOX 1000
Oxford, WI. 53952
29 May 1981

Privacy Act Officer
Drug Enforcement Administration
1405 Eye Street NW
Washington, D.C. 20537

Re: Privacy Act Request

Dear Sir:

Under the provisions of the Privacy Act of 1974, 5 U.S.C. 522a, and the Freedom of Information Act, 5 U.S.C. 522, I hereby request a copy of my entire D.E.A. file, most especially the information compiled during the investigation initiated in September, 1980, primarily in the state of North Dakota.

If there are any fees for copying the records I am requesting, I ask that the agency grant me a waiver of fees based on my indigent status.

If all or any part of this request is denied, please cite the specific exemption(s) which you think justifies your refusal to release information. Also, please inform me of your agency's appeal procedure.

In order to expedite consideration of my request, my signature to this letter will be notarized by an officer of the Federal Correctional Institute at Oxford, WI.

It is my understanding Executive branch guidelines for implementation of Privacy Act provisions are acknowledgement of receipt of request within 10 working days, herein included an indication as to whether the request will be granted and, if so, when and where. From that point it is further my understanding that records will be produced within 30 working days. And if this is not

possible, the agency will advise me when it anticipates the request will be granted.

Sincerely,

/s/ Gregory J. Wentz
GREGORY J. WENTZ
04260-059
F.C.I. OXFORD, WI. 53952

/s/ Elizabeth Roeker
E. ROEKER
Parole Officer
Federal Correctional Institution
Oxford, Wisconsin 53952
"Authorized by the act of July 7, 1955
to administer oaths (18 U.S.C. 400.4)."

cc/ Sen Edward Kennedy, Senate Judiciary Committee
Sen Joseph Biden
Rep Byron Dorgan
U.S. Dist. Judge Paul Benson

EXHIBIT B

[SEAL]

U.S. Department of Justice
Drug Enforcement Administration
Jun 08 1981
Washington, D.C. 20537

Mr. Gregory J. Wentz
#04260-059
P.O. Box 1000
Oxford, WI 53952

Dear Mr. Wentz:

Re: DEA-DR-1-207-P

This is in response to your Freedom of Information/ Privacy Act (FOI/PA) request received by the Drug Enforcement Administration (DEA).

To ensure an accurate search of DEA records, an individual's complete name, date, and place of birth must be furnished. A form is enclosed to assist you in complying with this requirement.

An exceedingly heavy volume of FOI/PA requests has been received. Despite expansions of our staff, substantial delays in processing requests continue. Please be assured that your request is being handled as equitably as possible, and that all documents which can be released will be made available at the earliest possible date.

Sincerely,

/s/ Russ Aruslan
RUSS ARUSLAN
Chief /s/ CL
Freedom of Information Division

Enclosure

EXHIBIT C

Federal Correctional Institute
P.O. Box 1000
Oxford, WI. 53952

11 June 1981

Privacy Act Officer
Drug Enforcement Administration
1405 Eye Street NW
Washington, D.C. 20537

Re: DEA-DR-1-207

In response to your letter of 8 June 1981, I enclose the DEA Privacy Act Verification form as requested. Please note I have added my Social Security Number for your convenience.

As I am not able to comply with your request for a photocopy of an identifying document, as these items are not allowed in the possession of prisoners here at F.C.I. Oxford, I am again having my signature notarized by an officer of the Federal Prison System. I trust that will suffice for your purposes, since if it does not then an innocent man is serving a sentence under the name of Gregory J Wentz, or may be. I doubt if the Federal Courts would allow such a mistake.

If any or all of this request is denied, please cite the specific exemptions which you think justifies your refusal to release information. Also please inform me of your agency's appeal procedure.

It is my understanding that Executive Branch guidelines for implementation of Privacy Act provisions are acknowledgement of receipt of request within 10 working days, herein included an indication as to whether the request will be granted and, if so, when. From that point it is further my understanding that records will be produced within 30 working days. And if this is not possible,

the agency will advise me when it anticipates the request will be granted.

Sincerely,

/s/ Gregory J. Wentz
GREGORY J. WENTZ
04260-059
F.C.I. Oxford

/s/ Dennis Kurzydlo
D. KURZYDLO
Parole Officer
Federal Correctional Institution
Oxford, Wisconsin 53952
"Authorized by the act of July 7 1955
to administer oaths (18 U.S.C. 400.4)."

cc/ Sen. Edward Kennedy
Sen. Joseph Biden
U.S. District Judge, Paul Benson

FOI-09

EXHIBIT D

P.O. Box 1000
Oxford, WI. 53952

Mr. L.W. Nicks
Special Agent In Charge
Drug Enforcement Administration
657 2nd. Avenue North, Room 255
Fargo, ND 58102

28 July, 1981

Mr. Nicks:

In reviewing the Pre-Sentence Investigation Report in the case, United States of America v. Gregory J Wentz, District Court no. C2-80-43 and 44, I have noticed that this writer stands accused of having been "seriously involved in drugs since 1974".

In response to a challenge to the veracity of that statement, Chief Probation Office, Mr. Noah, avers that his statement is an accurate reflection of information received from the DEA and the USDA. Please see Enclosure.

Pursuant to the provisions of the Freedom of Information Act, Title 5 U.S.C. § 552 and the Privacy Act of 1974, Title 5 U.S.C. § 522a(d), I request access to the information which Mr. Noah obtained from the DEA and which was used as the basis for the statement that this writer has been involved in a criminal activity since 1974.

The Office of Management and Budget has established guidelines for implementation of Privacy Act requests. Under these guidelines the agency requested has 10 working days to acknowledge receipt of request and an additional 30 days to answer the request.

Since my request is so narrowly defined and concerns only material readily at hand, I expect no delays with this request.

Your attention to this matter is much appreciated.

Sincerely,

/s/ Gregory J. Wentz
GREGORY J. WENTZ

EXHIBIT E

P.O. Box 1000
Oxford, Wisconsin 53952

27 August, 1981

Director, Drug Enforcement Administration
1405 Eye Street NW
Washington, D.C. 20537

RE: Privacy Act Request

Dear Sir:

During the process of attempting to change some incorrect information in my Pre-Sentence Investigation Report I was informed by the writer of the Report, Chief Probation Officer in North Dakota, Mr. John Noah, that the information which I was challenging was received by him directly from the DEA office in Fargo, North Dakota and from the U.S. Attorney in the same city.

On the 28th of July, 1981, SAIC in Fargo, L.W. Nicks was requested under the provisions of the Privacy Act to grant access to the information upon which he based his statements to the Probation Officer. He was also sent at that time a copy of the Probation Officer's letter to me explaining the source of his information. Both letters are enclosed for your convenience.

As of this date I have had no correspondence from SAIC Nicks on this matter. This is in violation of the guidelines set up by the Office of Budget and Management, which stipulate acknowledgement of receipt of request within ten (10) working days and production of the requested information within thirty (30) working days. As stated in my request, the information requested is so narrowly defined I anticipate no problems of delays in the granting of my request.

I hereby request the Director to consider this letter a formal complaint and to require SAIC to answer the re-

quest for information. Further unexplained delays can only be considered a denial of my request.

Very truly yours,

/s/ Gregory J. Wentz
GREGORY J. WENTZ

cc/ U.S. District Court
District of North Carolina

EXHIBIT F

P.O. Box 1000
Oxford, Wisconsin 53952

18 August 1981

Privacy Act Officer
Drug Enforcement Administration
1405 Eye Street NW
Washington, D.C. 20537

RE: DEA-DR-1-207

Dear Sir:

It is now nine weeks since I complied with your request for identification and I have not received the information I requested.

It is my understanding that the Office of Management and Budget has set guidelines for answering FOIA/PA requests. The guidelines stipulate acknowledgement of receipt of request within ten working days and producing the requested material within thirty working days. In the event the agency is unable to meet that thirty day deadline, it is my understanding that the agency is to advise the requester when the request will be granted.

I have not been advised of any date by which the agency anticipates granting my request. I respectfully request such a date.

In the event I do not hear from you in this regard, I will consider the lack of response as a denial of my request.

Sincerely,

/s/ Gregory J. Wentz
GREGORY J. WENTZ

cc/ Senator Edward Kennedy
Senator Joseph Biden
U.S. District Judge Paul Benson

EXHIBIT G

SEP 10 1981

Mr. Gregory J. Wentz
P.O. Box 1000
Oxford, Wisconsin 53952

Dear Mr. Wentz:

Re: DEA-81-802-P

This is in response to your letter of August 18, 1981, regarding your pending Freedom of Information/Privacy Act request to the Drug Enforcement Administration (DEA).

DEA has received an exceedingly heavy volume of requests prior to receiving yours and every effort is being made to process your request as quickly as possible.

As stated in our original letter to you, your request was placed on a list of requests awaiting final processing. This list is maintained in chronological order based on date of receipt. Our practice of handling these requests in this manner has been upheld by the courts and we are required by Department of Justice policy to strictly adhere to the "first-in, first-out" concept.

At this time, we are unable to estimate how long it will take to reach your number in sequence. However, please be assured that we carefully monitor all FOI/PA requests and that we continue to apply diligent efforts to completing requests at the earliest possible time and releasing the information to which you are entitled under the FOI/PA.

Sincerely,

RUSS ARUSLAN
Chief
Freedom of Information Division

EXHIBIT H

MEMORANDUM [SEAL]

Subject—FOIA/PA Request—Gregory J. Wentz
81-0764

Date—24 NOV 1981

To Mr. Russ Aruslan
FOIA/PA Unit
Drug Enforcement Administration

From Susan A. Nellor
Attorney-Advisor
Executive Office for
United States Attorneys

We are processing the above-cited request.

XX We located the attached records which originated in your office. Pursuant to 28 C.F.R. 16.43(a)(2), we are referring this material to you for a direct reply to the requester. We have notified the requester of this referral. A copy of the original request is attached for your information.

—— We located certain records which originated in your office. The file numbers (and dates) of those records are attached or listed below, for your use in processing the attached request. Pursuant to 28 C.F.R. 16.43(a)(2), we are referring this material to you for a direct reply to the requester. We have notified the requester of this referral. A copy of the original request is attached for your information.

—— We located the attached records which originated in your office. Pursuant to 28 C.F.R. 16.43(a)(3), we are required to consult with your agency concerning the possible release or withholding of all or part of these records. Accordingly, please review and return the attached material designating that which

may be released and citing the applicable exemptions for any parts which may be exempted from mandatory release.

Additional Comments:

If you have any questions about this referral, please contact *Cynthia Robinson* on *633-4024*.

Attachments, as stated.

EXHIBIT I

[SEAL]

U.S. Department of Justice
Drug Enforcement Administration

DEC 16 1981

Washington, D.C. 20537

Gregory J. Wentz
F.C.I. Oxford
P.O. Box 1000
Oxford, WI 53952

Dear Mr. Wentz:

Re: DEA-81-1525-P

This is in response to your Freedom of Information/ Privacy Act (FOI/PA) request received by the Drug Enforcement Administration (DEA).

While Processing your request to the Executive Office for United States Attorneys, documents originated by DEA were located and have been referred to us for a direct reply to you. These documents will be processed in chronoligcal order based on the date of receipt.

An exceedingly heavy volume of FOI/PA requests has been received and substantial delays in processing requests continue. Please be assured that your request is being handled as equitably as possible, and that all documents which can be released will be made available at the earliest possible date.

Sincerely,

/s/ Russ Aruslan
RUSS ARUSLAN
Chief /s/ CL
Freedom of Information Division

FOI-07

EXHIBIT J

APR 19 1982

Re: DEA 81-802-P
81-1525-P
Civil Action #82-C-88
U.S. District Court,
Western District of Wisconsin

Mr. Gregory J. Wentz
FCI Oxford
P.O. Box 1000
Oxford, Wisconsin 53952

Dear Mr. Wentz:

Your Freedom of Information/Privacy Act (FOI/PA) request of May 29, 1981, seeking law enforcement investigative records on yourself from the Drug Enforcement Administration (DEA) has been reviewed. In addition, the DEA law enforcement investigative records referred to DEA by the Executive Office for the United States Attorney (EXOUSA) on November 24, 1981, based on your request of June 16, 1981, to that agency, have also been reviewed.

A search of DEA records has been completed, and a determination has been made to deny your request. The DEA Investigative Reporting and Filing System which contains all of the information you seek, including the material forwarded to DEA from EXOUSA, is exempt from the access and accountability provisions of the Privacy Act of 1974, pursuant to 5 USC 552a(j)(2).

In addition, this material is being withheld pursuant to 5 USC 552(b)(3) of the Freedom of Information Act. This exemption provides for the withholding of material which is specifically exempt from disclosure by statute.

If you wish to appeal any denial of your request, you may do so within thirty (30) days pursuant to 26 CFR 16.7.

The appeal should be directed to the Office of Privacy and Information Appeals, Department of Justice, Washington, D.C. 20530. Judicial review will thereafter be available either in the District where you reside or have a principal place of business, in the District where the records are maintained, or in the District of Columbia.

Sincerely,

RUSS ARUSLAN, Chief
Freedom of Information Division

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

Case No. 82-C-88

GREGORY J. WENTZ, PLAINTIFF,

vs.

DRUG ENFORCEMENT ADMINISTRATION, DEFENDANT.

[Filed Aug. 4, 1982]

FIRST AMENDED COMPLAINT

The First Amended Complaint of Gregory J. Wentz respectfully represents that he wishes to amend the Original Complaint filed herein to add the following paragraphs:

12.

The Court has jurisdiction over the subject matter of this litigation under the provisions of 5 U.S.C. § 552(a)(4)(B).

13.

The Court has jurisdiction over the subject matter of this litigation under the provisions of 5 U.S.C. § 552a(g)(1).

14.

The Defendant, DEA, has maintained in its records, and disseminated inaccurate information concerning Plaintiff.

15.

The inaccurate information maintained and disseminated by DEA has resulted in adverse decisions by the U.S.

Parole Commission directly affecting a liberty interest of Plaintiff.

16.

Plaintiff has been unable to obtain correction of the inaccurate information in DEA records by virtue of DEA's refusal to give serious consideration to Plaintiff's FOIA/PA requests until after Plaintiff filed suit in this matter.

17.

Plaintiff is entitled to a permanent injunction under the provisions of 5 U.S.C. § 552a(g)(2)(A) ordering the Defendant to amend the inaccurate portions of the record.

18.

Costs should be assessed against the United States and reasonable attorney's fees should be awarded to the Plaintiff under the provisions of 5 U.S.C. § 552a(g)(2)(B).

19.

Damages should be assessed against the United States and awarded to the Plaintiff in the amount of $50,000.00 or, such amount the Court finds proper and just, but not less than $1,000.00 pursuant to 5 U.S.C. § 552a(g)(4)(A).

20.

Costs should be assessed against the United States and reasonable attorney's fees should be awarded to the Plaintiff under the provisions of 5 U.S.C. § 552a(g)(4)(B).

21.

The DEA has promulgated regulations at 28 C.F.R. 16.98(a)(3) and given reasons therefore at 16.98(b)(3), which do not comply with the provisions under which they are promulgated, 5 U.S.C. § 552a(k) or with the Administrative Procedures Act.

22.

Plaintiff is entitled to a Declaratory Judgement prohibiting DEA from exempting material in this case pursuant to 5 U.S.C. § 552a(k)(2), and requiring Defendant DEA to promulgate regulations in conformance with the Privacy Act and the Administrative Procedures Act.

WHEREFORE, Plaintiff prays:

I. for leave of Court to amend the Original Complaint as set forth hereinabove;

II. for all relief request in the Original Complaint;

III. that a permanent injunction issue herein enjoining the DEA from maintaining inaccurate records, requiring the DEA to amend all inaccurate portions of the records, and to inform the U.S. Parole Commission of both the inaccuracies presently contained in the record and the amendments that subsequently occur.

IV. for damages in the amount of $50,000.00 or, in such amount the Court finds proper and just, but not less than $1,000.00.

V. that there be a judgment herein assessing all costs of this civil action against the United States and awarding the Plaintiff reasonable attorney's fees for the prosecution of this action;

VI. that a Declaratory Judgment issue herein prohibiting Defendant from exempting material in this case pursuant to 5 U.S.C. § 552a(k)(2), and requiring DEA to promulgate new regulations under 28 C.F.R. 16.98 (a)(3) and (b)(3) in conformance with the Privacy Act provisions and the Administrative Procedures Act.

VII. that the Court reconsider its denial of Plaintiff's request for appointed counsel.

/s/ Gregory J. Wentz
GREGORY J. WENTZ
04260-059
P.O. Box 1000
Oxford, Wisconsin 53952

ORDER

Let the foregoing First Amended Complaint be filed as prayed for and according to law.

Madison, Wisconsin, July ——, 1982.

United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

82-C-88

GREGORY J. WENTZ, PLAINTIFF,

v.

DRUG ENFORCEMENT ADMINISTRATION, DEFENDANT.

[Filed Aug. 4, 1982]

ORDER

The Court is in receipt of plaintiff's cross motion for summary judgment; plaintiff's motion for detailed justification, itemization and indexing under *Vaughn v. Rosen*, 484 F.2d 820, *cert. denied*, 415 U.S. 977 (1974); plaintiff's amended complaint; and a letter from defendant asserting that plaintiff's response to defendant's summary judgment motion is untimely with a request that judgment for defendant be entered or, in the alternative, that an extension be granted for reply to plaintiff's response.

Plaintiff was granted an extension to respond to defendant's motion for summary judgment motion to July 19, 1982, by order dated July 2, 1982. Plaintiff subsequently informed the court that he would have difficulty meeting that deadline. His response was received on July 27, 1982. The Court is convinced that this *pro se* plaintiff has been diligent in complying with the court's order considering the relative legal complexity of the issue being briefed. The Court will not, therefore, entertain a motion to dismiss for failure to prosecute even if the defendant makes a proper motion.

Plaintiff's amended complaint will be accepted. Defendant has made no objection to it and it appears that defendant reasonably anticipated plaintiff's action in this regard.

Plaintiff's motion under *Vaughn v. Rosen* will be denied at this time pending receipt of defendant's reply brief. If the court is convinced at that time that a ruling on this motion is necessary for decision on the summary judgment motions, the court will reconsider the denial and give defendant an opportunity to respond to the motion.

Defendant's request for thirty (30) days to reply to plaintiff's response and cross motion would seem to be justified in that plaintiff has expanded his complaint to include a claim that the information in his DEA file is inaccurate. However, the court must take notice of the burden on plaintiff as it concerns the inaccuracy of the information and the proof required to show wilful and intentional dissemination of such information. These burdens have clearly not been met at this stage because the government has not as yet answered concerning the claim much less admitted wilful and intentional wrongdoing. Thus summary judgment cannot be granted on the claim under 5 U.S.C. § 552a(g)(1)(C) because of the existence of factual disputes.

Accordingly, defendant need not reply to that portion of plaintiff's brief directed at inaccuracy of the records. The reply should be directed only at that portion of the brief which responds to plaintiff's right to access. The time given in the order below should be adequate.

Plaintiff has renewed his request for appointment of counsel. The request is denied for the reasons stated in the court's previous order. In accordance with *Maclin v. Freake*, 650 F.2d 885 (7th Cir. 1981), the Court finds that the factual and legal issues involved are not so complex as to require the appointment of counsel. This is particularly true in this case. Plaintiff has shown a more than adequate ability to pursue his claim *pro se*.

ORDER

IT IS ORDERED that plaintiff's request for leave to file an amended complaint is GRANTED.

IT IS FURTHER ORDERED that plaintiff's request for appointment of counsel is DENIED.

IT IS FURTHER ORDERED that plaintiff's motion for detailed justification, itemization and indexing under *Vaughn v. Rosen* is DENIED.

IT IS FURTHER ORDERED that plaintiff's motion for summary judgment only as it concerns his claim under 5 U.S.C. § 552a(g)(1)(C) is DENIED.

IT IS FURTHER ORDERED that defendant's reply brief is due on August 20, 1982.

Entered this 3rd day of August, 1982.

BY THE COURT:

/s/ John C. Shabaz
JOHN C. SHABAZ
District Judge

[Copy of this document has been mailed to the following: pltf & AUSA Einerson this 4th day of Aug. 1982]

By s/ S. Hahn
Deputy Clerk

U.S. DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

Civil Action No. 82-C-243

ALFRED B. SHAPIRO, PLAINTIFF

v.

DRUG ENFORCEMENT ADMINISTRATION

[Filed Aug. 6, 1982]

AFFIDAVIT OF RUSS ARSLAN

I, Russ Arslan, being duly sworn, depose and say as follows:

1. I am the Chief of the Freedom of Information Section of the Drug Enforcement Administration (DEA). As such, I am officially responsible for initially granting or denying requests made pursuant to the Freedom of Information/Privacy Acts (FOIA/PA), as amended (5 USC 552 and USC 552a), respectively.

2. I am familiar with the Complaint filed by the Plaintiff in which the Plaintiff made a request, pursuant to the Freedom of Information Act and Privacy Act, that DEA disclose certain documents.

3. By letter dated October 16, 1981, the Plaintiff requested ". . . a copy of any and all records or documents which pertain to any investigation of me or my activities. . . ." A true and correct copy of the Plaintiff's October 16, 1981 letter is attached hereto as Exhibit A.

4. By letter dated October 28, 1981, DEA advised the Plaintiff that he would have to submit his notarized signature or other proof of identity before DEA could begin processing his request. A true and correct copy of

DEA's October 28, 1981 letter is attached hereto as Exhibit B.

5. On November 11, 1981, the Plaintiff forwarded an executed Identity Verification and a copy of his fingerprint card to DEA. True and correct copies of the Identity Verification and fingerprint card are attached hereto as Exhibits C and C1, respectively.

6. By letter dated December 4, 1981, DEA advised the Plaintiff that his request will be assigned number 81-1499-P and will be handled in chronological order based on the date of receipt. A true and correct copy of DEA's December 4, 1981 letter is attached hereto as Exhibit D.

7. By letter dated January 13, 1982, the Plaintiff advised DEA that he has received no information from DEA for 3½ months. A true and correct copy of the Plaintiff's letter of January 13, 1982 is attached hereto as Exhibit E.

8. By letter dated June 4, 1982, the Plaintiff was notified that the processing of his request had been completed and the Defendant further advised the Plaintiff that there was no documents available to him because of the restrictive provisions of the Privacy Act of 1974. A true and correct copy of the Defendant's June 4, 1982 letter is attached hereto as Exhibit F.

9. I have reviewed the Plaintiff's October 16, 1981 request and the additional attachments postmarked November 12, 1981 and have decided that the Privacy Act prohibitions relied upon in DEA's determination letter of June 4, 1982, are applicable. All DEA references to the Plaintiff, which may be responsive to the request, cannot be released.

10. I hereby verify that each reference to the Plaintiff is subject to exemption (j) (2) of the Privacy Act (5 USC 552a) and further, that said references are located in criminal investigatory files which are contained in a

system of records that has been properly exempted as published in the Department of Justice Regulations cited at 28 CFR 16.98 et seq.

11. Accordingly all references to the Plaintiff have been properly withheld pursuant to the Privacy Act 5 USC 552a exemption (j)(2) and to the FOI Act of 5 USC 552 exemption (b)(3).

12. It is unnecessary to provide the Plaintiff with a detailed justification of each and every additional FOIA exemption that may be applicable on the basis that the (j)(2) exemption and the (b)(3) exemption are first and foremost categorically restrictive statutes prohibiting disclosure, and therefore references to the Plaintiff are not subject to discretionary release.

13. The subject of this Affidavit and the statements set forth herein are within my official purview and are true and correct to the best of my information, knowledge and belief.

/s/ Russ Arslan
RUSS ARSLAN,
Chief
Freedom of Information Section
Drug Enforcement Administration
Department of Justice

Sworn and subscribed to before me this 8th day of June, 1982.

/s/ Katherine L. Webster
Notary Public

My Commission Expires January 14, 1987

[SEAL]

EXHIBIT A

October 16, 1981
Drug Enforcement Administration
1405 Eye Street, N.W.
Washington, D.C. 20537

Re: Privacy Act Request

Dear Sirs:

Under the provisions of the Privacy Act of 1974, 5 U.S.C. 522a, I hereby request a copy of any and all records or documents which pertain to any investigation of me or my activities. This should be construed as the broadest possible request for information concerning me which is in the possession of your agency.

If there are any fees for copying the records I am requesting, please inform me before you fill the request.

If all or part of this request is denied, please cite the specific exemption(s) which you feel justifies your refusal to release the information. Also, please inform me of your agency's appeal procedure.

Your assistance is appreciated.

/s/ Alfred Bruce Shapiro
ALFRED BRUCE SHAPIRO
Social Security No. 438-60-2137
Reg. No. 05158-035
P.O. Box 1000
Oxford, Wisconsin 53952

EXHIBIT B

[SEAL]

U.S. Department of Justice
Drug Enforcement Administration
OCT 28 1981
Washington, D.C. 20537

Alfred Bruce Shapiro
Reg. No. 051580-035
P.O. Box 1000
Oxford, Wisconsin 53952

Re: DEA-DR-1-383-P

This is in response to your Freedom of Information/ Privacy Act (FOI/PA) request received by the Drug Enforcement Administration (DEA).

Before DEA can begin processing your request, it will be necessary for you to submit your *notarized signature* or other proof of identity. This procedure is designed to ensure that information pertaining to an individual is released only to that person. Also, to ensure an accurate search of DEA records, an individual's name, date, and place of birth must be furnished. A form is enclosed to assist you in complying with this requirement.

An exceedingly heavy volume of FOI/PA requests has been received and substantial delays in processing requests continue. Please be assured that your request is being handled as equitably as possible, and that all documents which can be released will be made available at the earliest possible date.

Sincerely,

/s/ Russ Aruslan
RUSS ARUSLAN
Chief /s/ CL
Freedom of Information Division

Enclosure

FOI-06

EXHIBIT C

DR-1-383-P

DEA PRIVACY ACT
IDENTITY VERIFICATION

81-1499-P

In accordance with 28 CFR 16.41, the information on this form is required for all individuals submitting requests by mail under the Privacy Act, P.L. 93-579. This information will be used to verify the applicant's identity and to identify records available to him/her. Return this form to the Drug Enforcement Administration, Freedom of Information Division, 1405 Eye Street, N.W., Washington, DC 20537.

FULL NAME OF REQUESTER: Alfred Bruce Shapiro

CURRENT ADDRESS: Reg. No. 05158-035
P.O. Box 1000 Oxford Wisconsin 53952

DATE OF BIRTH: December 29, 1942

PLACE OF BIRTH: Alexandria, Louisiana

EMPLOYEE IDENTIFICATION NO. (If applicable):
Social Security Account No. 438-60-2137

SIGNATURE: /s/ Alfred B. Shapiro

Please attach a photocopy of an identifying document (such as a passport, identification badge, drivers' license, etc.) *or* complete the form below.

I certify that I am the person named above, and I understand that any falsification of this statement is punish-

able under the provisions of 18 USC 1001 by a fine or imprisonment or both.

Signature: /s/ Alfred Bruce Shapiro

/s/ [Illegible]

Subscribed and sworn to before me this 9th day of Nov., 1981.

_____

Notary Public

My Commission Expires: _____

FOI-09

EXHIBIT D

[SEAL]

U.S. Department of Justice
Drug Enforcement Administration
Washington, D.C. 20537

DEC 4 1981

Mr. Alfred Bruce Shapiro
Reg. No. 05158-035
Post Office Box 1000
Oxford, Wisconsin 53952

Dear Mr. Shapiro:

Re: DEA-81-1499-P

This will acknowledge receipt of the information we need to process your Freedom of Information/Privacy Act (FOI/PA) request. Please make note of the new control number reference above pertaining to your FOI/PA request.

As we stated in our original letter to you, your request will be placed on a list of requests awaiting final processing. This list is maintained in chronological order based on date of receipt. Our practice of handling these requests in this manner has been upheld by the courts and we are required by Department of Justice policy to strictly adhere to the "first-in, first-out" concept.

At this time, we are unable to estimate how long it will take to reach your number in sequence. However, please be assured that we carefully monitor all FOI/PA requests and that we continue to apply diligent efforts to completing requests at the earliest possible time and releasing the information to which you are entitled under the FOI/PA.

Sincerely,

/s/ Russ Aruslan
RUSS ARUSLAN
Chief /s/ DNZ
Freedom of Information Division

EXHIBIT E

January 13, 1982

Mr. Russ Aruslan, Chief
Freedom of Information Division
Drug Enforcement Administration
Washington, D.C. 20537
Re: DEA-81-1499-P

Dear Mr. Aruslan:

On December 4, 1981, I received a letter from your agency informing me that you had received the information necessary to process my request for information concerning investigations of myself. Since that date, I have received no information concerning the possible cost of reproduction of such material. In fact, I have received no information whatsoever. It seems to me that some preliminary estimate of costs could be undertaken and other such steps could be disposed of so that my request could be filled as soon as possible. A delay of 3½ months from the date of my original contact with you borders on the unacceptable.

I would appreciate your office taking whatever steps are necessary to expedite this matter.

Thanking you, I remain

Sincerely yours,

/s/ Alfred B. Shapiro
ALFRED B. SHAPIRO
05158-035
P.O. Box 1000
Oxford, Wisconsin 53952

EXHIBIT F

JUN 4 1982

Alfred Bruce Shapiro
Reg. No. 051580-035
P.O. Box 1000
Oxford, Wisconsin 53952

81-1499-P

Dear Mr. Shapiro:

Your perfected Privacy Act request postmarked November 12, 1981 seeking law enforcement investigatory records on yourself from the Drug Enforcement Administration (DEA) has been reviewed. A search of DEA records has been completed and a determination has been made to deny your request. The DEA Investigative Reporting and Filing System which contains all of the information you seek is exempt from the access and accountability provisions of the Privacy Act of 1974 pursuant to 5 U.S.C. 552a(j)(2).

In addition, this material is being withheld pursuant to 5 USC 552(b)(3) of the Freedom of Information Act. This exemption provides for the withholding of material which is specifically exempt from disclosure by statute.

If you wish to appeal any denial of your request, you may do so within thirty (30) days pursuant to 28 CFR 16.7. The appeal should be directed to the Office of Privacy and Information Appeals, Department of Justice, Washington, D.C. 20530. Judicial review will thereafter be available either in the District where you reside or have a principal place of business, in the District where the records are maintained, or in the District of Columbia.

Sincerely,

FRANCIS M. MULLEN, JR.
Acting Administrator

by Russ Arslan, Chief
Freedom of Information Section

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

82-C-88

GREGORY J. WENTZ, PLAINTIFF,

v.

DRUG ENFORCEMENT ADMINISTRATION, DEFENDANT.

82-C-243

ALFRED B. SHAPIRO, PLAINTIFF,

v.

DRUG ENFORCEMENT ADMINISTRATION, DEFENDANT.

[Filed Oct. 8, 1982]

MEMORANDUM AND ORDER

Before the Court are cross motions for summary judgment in the above named cases. Because the two cases raise identical issues and have been briefed in an almost identical fashion, these cases are consolidated for purposes of this order pursuant to Rule 42(a), Federal Rules of Civil Procedure.

The plaintiffs in these actions seek access to the records of the Drug Enforcement Agency which pertains to them. Disclosure of these records is sought pursuant to the Freedom of Information Act, 5 U.S.C. § 552, and the Privacy Act, 5 U.S.C. § 552a. Jurisdiction of this Court is invoked pursuant to 5 U.S.C. § 552(a)(4)(B) and 5 U.S.C. § 552a(g)(1).

Each of the plaintiffs requested, pursuant to the Privacy Act, access to information within the control of the Drug Enforcement Agency ("DEA"). Wentz' request was made in May, 1981; Shapiro's in November, 1981. After these requests were perfected by the plaintiffs through the submission of identifying information, DEA denied access, basing the withholding of the information in the records on exemptions provided in the Privacy Act and in the Freedom of Information Act ("FOIA"). The specific exemptions relied upon were 5 U.S.C. § 552(b)(3) and 5 U.S.C. 552a(j)(2).

Wentz received the determination to deny his request in April, 1982; Shapiro in June, 1982. While each of the plaintiffs seek access to their respective files, Wentz, in addition, seeks correction of assertedly incorrect information in the records which contain his name and also seeks damages under 5 U.S.C. § 552a(g)(4). The information Wentz claims is incorrect concerns the component make-up and value of the controlled substance, possession of which led to his criminal conviction, and the statement in his pre-sentence report, apparently based on DEA records, that he had been involved with drugs for a number of years prior to his conviction.

Since the exemptions which the defendant claims apply to both disclosure and correction of incorrect information, 5 U.S.C. § 552a(j), the Court will treat the claims of each plaintiff identically. The plaintiffs have relied on each other's briefs and the defendant has filed virtually identical briefs on the issues raised by the summary judgment motions.

MEMORANDUM

Defendants rely on the exemption provisions of the FOIA and the Privacy Act for the proposition that any information contained in systems of records compiled for investigatory law enforcement purposes is exempt from

disclosure. The applicable parts of the exemption statutes are as follows:

5 U.S.C. § 552(b)

> (b) This section does not apply to matters that are—
>
> > (3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

5 U.S.C. § 552a(j)

> (j) General exemptions.—The head of any agency may promulgate rules, in accordance with the requirements (including general notice) of sections 553(b)(1), (2), and (3), (c), and (e) of this title, to exempt any system of records within the agency from any part of this section except subsections (b), (c)(1) and (2), (e)(4)(A) through (F), (e)(6), (7), (9), (10), and (11), and (i) if the system of records is—
>
> > (2) maintained by an agency or component thereof which perform as its principal function any activity pertaining to the enforcement of criminal laws, including police efforts to prevent, control, or reduce crime or to apprehend criminals; and the activities of prosecutors, courts, correctional, probation, pardon, or parole authorities, and which consists of (A) information compiled for the purpose of identifying individual

> criminal offenders and alleged offenders and consisting only of identifying data and notations of arrests, the nature and disposition of criminal charges, sentencing, confinement, release, and parole and probation status; (B) information compiled for the purpose of a criminal investigation, including reports of informants and investigators, and associated with an identifiable individual; or (C) reports identifiable to an individual compiled at any stage of the process of enforcement of the criminal laws from arrest or indictment through release from supervision.

As it concerns the exemptions in FOIA at § 552(b)(3), it is clear that the Privacy Act is a "statute" which explicitly exempts certain information from disclosure. *Painter v. Federal Bureau of Investigation*, 615 F.2d 689 (5th Cir. 1980). The Privacy Act, designed as it was to protect individuals from government disclosure of information about them, must be read in such a way despite plaintiffs' assertions to the contrary. Thus, plaintiffs' right to access to the records involved here must rise or fall on the Privacy Act alone.

The Privacy Act exemption relied upon by defendant requires that rules be promulgated, naming the systems of records exempted under the provisions under § 552a (j). The DEA has done so at 28 C.F.R. § 16.98. The affidavit of Russ Arslan, filed on behalf of the defendant in support of its summary judgment motions, states:

> I hereby verify that each and every reference to the Plaintiff found in DEA records systems is subject to exemption (j)(2) of the Privacy Act (5 U.S.C. 552a) and further, that said references are contained in criminal investigatory files which are located in a system of records that has been properly exempted

as published in the Department of Justice Regulations cited at 28 C.F.R. 16.98 et. seq.[1]

The defendant reads § 552a(j) to create a blanket exemption from disclosure for systems of records maintained by DEA, an agency which is obviously one which "performs as its principal function any activity pertaining to the enforcement of criminal laws . . ." It also seems clear that defendant is relying on subsections (j)(2)(B) and (C) to support the scope of the exemption claimed in these cases. According to the Arslan affidavit, all of the references to the plaintiffs appear in records subject to the (j)(2) exemption. It is therefore apparent that the systems of records which contain references to plaintiffs must be included in that list of systems at 28 C.F.R. § 16.98(c). These are the only ones which are based on the (j)(2) exemption. Plaintiffs' assertions that DEA cannot depend on the (j)(2) exemption for systems listed in 28 C.F.R. § 16.98(a) are correct but irrelevant because a necessary implication from the affidavit language quoted above is that the systems listed in (a)(3) are not involved.

The Court must conclude that the blanket exemption claimed by the DEA is correct. The systems involved are listed in the regulations and the reasons for the exemptions are listed with sufficient specificity to accomplish the purpose of the statute which required promulgation of the regulations. The arguments raised by plaintiffs have considerable force but must be rejected because of the rather sweeping language of the statute in question, § 552a(j)(2). The DEA has done what the statute requires and is entitled to the exemption for the systems of records listed at 28 C.F.R. § 16.98(c).

See also: *Nunez v. Drug Enforcement Administration*, 497 F. Supp. 209 (S.D.N.Y. 1980) (records sought relat-

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[1] This statement was contained in Arslan's affidavit filed in plaintiff Wentz's action. It is virtually identical to that filed in Shapiro's action.

ing to DEA law enforcement activities not accessible pursuant to 5 U.S.C. § 552a(j)(2); *Greentree v. U.S. Customs Service*, 515 F. Supp. 1145 (D.C.D.C. 1981) (the Privacy Act exemption statute is a "statute" within the meaning of 5 U.S.C. § 552(b)(3).

Plaintiff Wentz' claims concerning the incorrect information in the records is, as the Court has mentioned, subject to the same exemptions that have been properly raised by defendant as it concerns disclosure. Thus, the amendment to the complaint must fall on the summary judgment motion along with the claims in the original complaint. *See Varona Pacheco v. Federal Bureau of Investigation*, 456 F. Supp. 1024, 1034, (D.C. Puerto Rico 1978) (exemption provisions of the Privacy Act apply to correction provisions of the Act as well as to the disclosure provisions). This does not mean that plaintiff does not have a right to have accurate information before those who will make decisions concerning his sentence and parole. It only means that the forum for challenging the information is not an action under the Privacy Act.

Accordingly,

ORDER

IT IS ORDERED that plaintiffs' motions for summary judgment are DENIED.

IT IS FURTHER ORDERED that defendants' motions for summary judgment, as they concern the complaints and amendments, are GRANTED.

Entered this 6th day of October, 1982.

BY THE COURT:

/s/ John C. Shabaz
JOHN C. SHABAZ
District Judge

[Copy of this document has been mailed to the following: pltf & AUSA Einerson this 8th day of Octfl 1982]

By /s/ S. Hahn
Deputy Clerk

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Nos. 82-2818 and 82-2819

ALFRED B. SHAPIRO and GREGORY J. WENTZ,
PLAINTIFFS-APPELLANTS,

v.

DRUG ENFORCEMENT ADMINISTRATION,
DEFENDANT-APPELLEE.

Appeal from the United States District Court for the Western District of Wisconsin

Nos. 82 C 88 and 82 C 243—John C. Shabaz, *Judge*

ARGUED SEPTEMBER 16, 1983—DECIDED NOVEMBER 16, 1983

Before BAUER, WOOD, *Circuit Judges*, and NEAHER,* *Senior District Judge.*

BAUER, *Circuit Judge.* Plaintiffs-appellants Shapiro and Wentz each were convicted in unrelated cases of violating 21 U.S.C. § 841 (1980), and both currently are serving prison terms. Shapiro and Wentz filed separate requests with the Drug Enforcement Administration (DEA) seeking access to their DEA files pursuant to the Freedom of Information Act, 5 U.S.C. § 552 (1976)

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* The Honorable Edward R. Neaher, Senior Judge of the United States District Court for the Eastern District of New York, is sitting by designation.

(FOIA) and the Privacy Act, 5 U.S.C. § 552a (1975) (Privacy Act). The district court denied their requests on the ground that the records are exempt under Privacy Act Section (j)(2) (Exemption (j)(2)) and FOIA Section (b)(3) (Exemption 3). We affirm.

I. Background

In May 1981, Wentz filed a request with the DEA to obtain a copy of the DEA records pertaining to him; Shapiro made his request in October 1981. In April 1982, the DEA notified Wentz that all the documents he requested were in the DEA Investigative Reporting and Filing System and thus were exempt from access pursuant to Exemption (j)(2) of the Privacy Act and Exemption 3 of the FOIA. In June 1982, the DEA notified Shapiro that his request had been denied for the same reasons.

In March 1982, Wentz filed suit to compel release of the documents he had requested. Wentz later added a claim that the agency be required to correct allegedly inaccurate information in his files pursuant to the Privacy Act. Shapiro filed his suit in May 1982.

The district court consolidated the two cases because they raised identical issues. In October 1982, the district court granted the DEA's motions for summary judgment. The court held that the DEA had met the Privacy Act Exemption (j)(2) requirements by exempting these records from disclosure at 28 C.F.R. § 16.98(c). The district court also held that because the Privacy Act is a statute that exempts this information from disclosure, the information is exempt under FOIA Exemption 3 as well. Finally, the court held that since Privacy Act Exemption (j)(2) applies to the Act's correction provisions, Wentz's request for correction of the allegedly inaccurate records also must be denied.

II. Privacy Act Exemption (j)(2)

Congress enacted the Privacy Act in 1974. The Act guarantees individuals access to certain agency records about themselves, *see* 5 U.S.C. § 552a(d), and prevents the release of such records to third parties without the consent of the individual except under specific instances, *see* 5 U.S.C. § 552a(b). The Privacy Act applies only to agency "records," which the Act defines as agency files or documents about individuals, contained in a "system of records," which is a group of agency records from which an agency retrieves information using the name of the individual or some other personal identifier. *See* 5 U.S.C. §§ 552(a)(4) and (5).

An individual's right of access under the Privacy Act is not unlimited, however. Sections (j) and (k) of the Act give agencies the discretion to refuse to disclose certain records. Under (j)(2), the head of an agency whose principal function is law enforcement may promulgate rules exempting from access any system of records containing information compiled for the purpose of criminal investigation.[1]

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[1] 5 U.S.C. § 552a(j)(2) provides:

> The head of any agency may promulgate rules, in accordance with the requirements (including general notice) of sections 553(b)(1), (2), and (3), (c), and (e) of this title, to exempt any system of records within the agency from any part of this section except subsections (b), (c)(1) and (2), (e)(4)(A) through (F), (e)(6), (7), (9), (10), and (11), and (i) if the system of records is—
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> • • • •
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> 2 maintained by an agency or component thereof which performs as its principal function any activity pertaining to the enforcement of criminal laws, including police efforts to prevent, control, or reduce crime or to apprehend criminals, and the activities of prosecutors, courts, correctional, probation, pardon, or parole authorities, and which consists of (A) information compiled for the purpose of identifying individual criminal offenders and alleged offenders and consisting only of identifying data and notations of arrests, the nature and dispo-

The DEA has promulgated a regulation pursuant to Exemption (j)(2) that exempts its Investigative Reporting and Filing System from access to individuals.[2] The regulation justifies the exemption on the ground that access to such records would alert a subject to the existence of an investigation and thereby impede law enforcement efforts.[3] As the district court held, this explanation is sufficiently specific to satisfy the (j)(2) requirement that the regulation include reasons why the system is to be exempted.

Appellants' argument that this explanation renders the exemption inapplicable to them because they currently are imprisoned is without merit. First, the fact that appellants already have been convicted does not mean that the DEA is no longer investigating them. Moreover, Exemption (j)(2) does not require that a regulation's rationale for exempting a record from disclosure apply in each particular case. It is sufficient that the system of records be exempted properly, as the DEA has done here.

The DEA supported its motion for summary judgment in each case with an affidavit by Russ Arslan, the chief of the DEA's Freedom of Information Division. The affidavits stated that all references to Wentz and Shapiro are

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sition of criminal charges, sentencing, confinement, release, and parole and probation status; (B) information compiled for the purpose of a criminal investigation, including reports of informants and investigators, and associated with an identifiable individual; or (C) reports identifiable to an individual compiled at any stage of the process of enforcement of the criminal laws from arrest or indictment through release from supervision.

At the time rules are adopted under this subsection, the agency shall include in the statement required under section 553(c) of this title, the reasons why the system of records is to be exempted from a provision of this section.

The Act labels this a "general" exemption, as opposed to the "specific" exemptions at 5 U.S.C. § 552a(k).

[2] The regulation appears at 28 C.F.R. 16.98(c).

[3] 28 C.F.R. 16.98(d)(3).

contained in criminal investigatory files that have been exempted according to published regulations.[4]

Wentz and Shapiro argue that the Arslan affidavits are insufficient. They contend that this court should require the DEA to prepare a *Vaughn* index of the requested documents, which would oblige the agency to "specify in detail which portions of the document are disclosable and which exempt." *Vaughn v. Rosen*, 484 F.2d 820, 827 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1977).

While courts mandate *Vaughn* indexing where an agency relies solely on an FOIA exemption to withhold information, the procedure does not apply to Exemption (j) of the Privacy Act. The FOIA exemptions are "specific" exemptions that apply only to individual documents; thus, courts require an indexed listing of the requested documents because "[w]hen the Government makes a general allegation of exemption, the court may not know if the allegation applies to all or only a part of the information." *Id.* at 825. In contrast, Privacy Act Exemption (j) applies to whole systems of records. The only requirements are that the agency's principal function be law enforcement, that the system of records be compiled for the purpose of criminal investigation, and that the agency promulgate regulations exempting the system of records. As already noted, the DEA has met these requirements here. The Privacy Act requires nothing more

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[4] Arslan's affidavit in Wentz's case states:

> I hereby verify that each and every reference to the Plaintiff found in DEA records systems is subject to exemption (j)(2) of the Privacy Act (5 USC 552a) and further, that said references are contained in criminal investigatory files which are located in a system of records that has been properly exempted as published in the Department of Justice Regulations cited at 28 CFR 16.98 et. seq.

R. 14, at 3.

Arslan's affidavit in Shapiro's case is basically the same. See R. 7, at 2.

from an agency seeking the (j)(2) exemption.[5] The district court thus properly held that the requested documents are exempt under the Privacy Act.

III. Freedom Of Information Act

Appellants Wentz and Shapiro next argue that they may obtain the requested records under the FOIA. Because their position conflicts with both the statutory language and legislative history of the FOIA and the Privacy Act, we affirm the district court's denial of access under the FOIA as well.

A. Background

Congress enacted the FOIA in 1966. The Act is a general disclosure statute whose purpose is to promote public access to federal government records. Just as the Privacy Act does not allow unlimited access to agency records, the FOIA contains exemptions that allow an agency to withhold records under certain circumstances; these nine "specific" exemptions are listed at 5 U.S.C. § 552(b).

Exemption 3, 5 U.S.C. § 552(b)(3), provides that the FOIA does not apply to information "specifically exempted" by other statutes.[6] The DEA has relied on Ex-

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[5] This conclusion is underscored by the Privacy Act's requirement of *de novo* review and possible *in camera* inspection if an agency invokes a Section (k) "specific" exemption. See 5 U.S.C. 552a(g)(3)(A). There is no such provision for agencies that seek the "general" exemptions in Section (j).

[6] 5 U.S.C. § 552(b)(3) provides:

> This section does not apply to matters that are—
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> * * * *
>
> (3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.

emption 3 to deny appellants' request. It reasons that because the requested information is exempted from disclosure by the Privacy Act, the information also is unavailable under the FOIA. Wentz and Shapiro contend that the Privacy Act is not an Exemption 3 "statute," and thus the DEA may not use Exemption 3 to deny their request.

The district court held that the Privacy Act is a FOIA Exemption 3 statute. This holding is supported by our decision in *Terkel v. Kelly*, 599 F.2d 214 (7th Cir. 1979), *cert. denied*, 444 U.S. 1013 (1980). In *Terkel*, we held that the FBI was not required to disclose documents under the FOIA that were exempt from release under Privacy Act Exemption (k): "Although the Freedom of Information Act does not contain a comparable exemption, we agree with the lower court that the two statutes must be read together, and that the Freedom of Information Act cannot compel the disclosure of information that the Privacy Act clearly contemplates to be exempt." *Id.* at 216.

The Fifth Circuit also has held that requesters may not use the FOIA to avoid the Privacy Act nondisclosure provisions. In *Painter v. FBI*, 615 F.2d 689 (5th Cir. 1980), the court specifically held that the Privacy Act is a FOIA Exemption 3 statute. Several recent district court decisions also have held that an agency may not be compelled to disclose information under the FOIA if that information is exempt from disclosure under the Privacy Act. *See Martin v. FBI*, No. 83 C 123 (N.D. Ill. Sept. 30, 1983); *Rachel v. Department of Justice*, No. 83 C 0434 (N.D. Ill. Aug. 1, 1983); *Turner v. Ralston*, 567 F. Supp. 606 (W.D. Mo. 1983); *Anderson v. Huff*, No. 3-82-52 (D. Minn. June 8, 1982); *Heinzl v. Immigration and Naturalization Service*, No. C-80-1210 (N.D. Cal. Dec. 17, 1981).

On the other hand, two circuit courts recently have held that the Privacy Act is not a FOIA Exemption 3 statute. *See Porter v. Department of Justice*, No. 82-1833 (3rd

Cir. Sept. 15, 1983); *Provenzano v. Department of Justice*, No. 82-5681 (3rd Cir. Sept. 15, 1983); *Greentree v. U.S. Customs Service*, 674 F.2d 74 (D.C. Cir. 1982).

Appellants urge us to reconsider our holding in *Terkel v. Kelley, supra*. Upon close examination of both the statutory language and relevant legislative history, we are persuaded to reaffirm our earlier decision. We hold that the district court correctly decided that the Privacy Act's nondisclosure provisions apply to FOIA requests under FOIA Exemption 3.

B. The Literal Requirements of FOIA Exemption 3

In order to qualify under FOIA Exemption 3, a statute must specifically exempt the requested information from disclosure, and either must "leave no discretion on the issue" of disclosure, or must establish "particular criteria for withholding" or refer to "particular types of matters to be withheld." *See* 5 U.S.C. § 555(b)(3). Privacy Act Exemption (j)(2) clearly meets these requirements. First, its provisions specifically exempt the information requested here. Second, it describes the type of record to be withheld with sufficient specificity to meet the requirement that it refer to "particular types of matters to be withheld." Appellants' argument that Exemption (j)(2) vests too much discretion with the agencies is thus without merit.

Appellants contend that Congress still could not have intended the Privacy Act to be an Exemption 3 statute because nowhere in the legislative history of the Privacy Act or the 1976 proceedings that amended Exemption 3 did Congress refer to the Privacy Act as an Exemption 3 statute. This argument is also without merit, however, because appellants have not shown any congressional statement that the Privacy Act is *not* an Exemption 3 statute. Rather, Congress set out specific criteria in Exemption 3, and the Privacy Act meets these requirements.

Appellants also argue that because Privacy Act exemption (j) exempts "any system of records within the agency

from any part of *this* section" (emphasis added), it is limited to the Privacy Act itself, Section 552a. Yet this interpretation would allow a requester to bypass the Exemption (j) nondisclosure provision and seek the information through the FOIA instead. For reasons that we outline below in our discussion of Privacy Act Section (b) (2), this result is contrary to clearly stated congressional intent.

C. The Interrelationship of the Privacy Act and the Freedom of Information Act: Privacy Act Section (b) (2)

1. *Statutory Language*

In addition to the argument that the term "this section" at Exemption (j) renders the exemption inapplicable to the FOIA disclosure requirements, appellants contend that the Privacy Act Section (b) (2) specifically preserves the FOIA disclosure obligations. Section (b) (2) provides:

> No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be—
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> • • • • •
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> (2) required under section 552 of this title [FOIA].

5 U.S.C. § 552a(b) (2).

Appellants argue that Section (b) is the provision designed to govern disclosure under the Privacy Act, and because Section (b) is not covered under Privacy Act Exemption (j),[7] Congress has exempted the FOIA disclosure

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[7] *See supra* note 1.

requirements from Exemption (j).[8] For several reasons, however, we cannot accept this interpretation of the interrelationship of these two statutes. First, we disagree with appellants' reading of Section (b). The provisions of Section (b)(1)-(11) all require agency disclosure to a third party requester even though the individual to whom the record pertains has not consented to the disclosure. Yet the introductory language of Section (b) shows that the provisions of (b)(1)-(11) do not apply when the individual consents to disclosure. The language of this opening proviso shows that (b)(2) governs only third party requests for information; where the individual has made a first party request for information pertaining to himself, the FOIA exemption carved out at Section (b)(2) simply does not apply.[9] Section (d) provides sole access for first party requests under the Act.[10]

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[8] The court in *Greentree v. U.S. Customs Service*, 674 F.2d 74 (D.C. Cir. 1982), relied on this construction in reaching its conclusion.

[9] This conclusion is supported by the legislative history, which shows that Section (b)(2) was designed to protect third party access to agency records. *See* Subsection C, part 2 of text *infra*.

[10] 5 U.S.C. § 552a(d) provides in pertinent part:

> Each agency that maintains a system of records shall—
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> (1) upon request by any individual to gain access to his record or to any information pertaining to him which is contained in the system, permit him and upon his request, a person of his own choosing to accompany him, to review the record and have a copy made of all or any portion thereof in a form comprehensible to him, except that the agency may require the individual to furnish a written statement authorizing discussion of that individual's record in the accompanying person's presence;
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> (2) permit the individual to request amendment of a record pertaining to him and—
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> (A) not later than 10 days (excluding Saturdays, Sundays, and legal public holidays) after the date or receipt of such request, acknowledge in writing such receipt; and

2. *Legislative History*

Second, appellants' position would result in an emasculation of Privacy Act Exemption (j)(2) that would be inconsistent with clearly articulated congressional intent. According to appellants' interpretation, any requester could use the FOIA to force an agency to disclose information even when that information is specifically exempt from disclosure under Exemption (j). The scope of Exemption (j) thus would be limited to the scope of any applicable FOIA exemptions. This limitation on Exemption (j) is contrary to the intent of Congress, however, as shown both by the exemption's language, which is broader than the FOIA exemption covering law enforcement records (Exemption 7), and by the relevant legislative history of the Privacy Act.

The legislative history reveals Congress' special concern that individuals not be permitted access to certain records containing information about their own criminal investigations. In its report on the Senate version of the Privacy Act, the Senate Government Operations Committee observed that law enforcement agencies often maintain files with "highly sensitive and usually confidential information collected by law enforcement officers in anticipation of criminal activity"; the report concluded that

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(B) promptly, either—

(i) make any correction of any portion thereof which the individual believes is not accurate, relevant, timely, or complete; or

(ii) inform the individual of its refusal to amend the record in accordance with his request, the reason for the refusal, the procedures established by the agency for the individual to request a review of that refusal by the head of the agency or an officer designated by the head of the agency, and the name and business address of that official;

• • • •

"it would not be appropriate to allow individuals to see their own intelligence or investigative files." S. Rep. No. 93-1183, 93d Cong., 2d Sess., at 23 (1974).

The House of Representatives Government Operations Committee report commented on the House version's exemption from disclosure for Central Intelligence Agency and criminal justice records and also concluded: "The Committee believes that such a broad exemption is permissible for these two types of records because they contain particularly sensitive information." H.R. Rep. No. 93-1416, 93d Cong., 2d Sess., at 18 (1974). This congressional concern that first party requesters not be allowed to require agencies to disclose criminal justice records relating to them is supported by Representative Moorehead's explanation of the Privacy Act when the legislation was presented on the House floor: "[e]ach individual shall be given access to his record within the system on his request, with the exception of files related to criminal investigations or national security." 120 Cong. Rec. 36644 (1974), *reprinted in* Legislative History of the Privacy Act of 1974, Source Book on Privacy 883 (1976) (hereinafter Source Book).

Appellants place great emphasis on the original Senate version of the Privacy bill, which contained a provision making the Act's nondisclosure provisions subject to other federal laws and regulations, *see* Section 205(b), S. 3418, Source Book at 143. This provision, they maintain, was included in the final compromise bill as Section (b)(2), and thus shows that Congress intended FOIA access to be unaffected by the Privacy Act nondisclosure provisions.

We cannot accept this interpretation of congressional intent. As noted above, in its final version Section (b)(2) is prefaced by an introductory proviso making it inapplicable where an individual requests access to his own records. Where Congress intended to retain provisions in the Senate bill that outlined other aspects of the relationship between the Privacy Act and the FOIA, it did so without qualification. For example, the original Senate

version contained a provision that stated that an agency could not use FOIA exemptions to deny disclosure under a Privacy Act request, *see* S. 3418, 93d Cong., 2d Sess. § 205(a), *reprinted in* Source Book at 143. The final Act retained this provision in Section (q)[11] without any limiting provisos.[12]

Section (b)(2) apparently was included to guarantee that the access that the press and media enjoyed under the FOIA would not be curtailed by the Privacy Act. The Senate Report explained that an earlier version of Subsection (b)(2) was included in the Privacy bill "to meet the objections of press and media representatives that the statutory right of access to public records and the right to disclosure of government information might be defeated if such restrictions were to be placed on the public and press." S. Rep. No. 1183, 93d Cong., 2d Sess. 71 (1974), *reprinted in* Source Book at 224.

In response to our conclusion that their interpretation would render Privacy Act Exemption (j) virtually meaningless, appellants contend that under their position Exemption (j) would retain some meaning because it would exempt agencies from other requirements of the Act not related to disclosure. For example, an agency could rely on Exemption (j) to avoid many of the Section (e) requirements intended to insure that records are collected and maintained accurately. *See* 5 U.S.C. § 552a(e). *See also Greentree, supra*, 674 F.2d at 81.

Although Exemption (j) indeed specifically exempts agencies from complying with certain Privacy Act requirements besides disclosure, it also clearly exempts

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[11] No agency shall rely on any exemption contained in section 552 [FOIA] of this title to withhold from an individual any record which is otherwise accessible to such individual under the provisions of this section.

5 U.S.C. § 552(a)(q).

[12] The Fifth Circuit relied on this reasoning to hold that the Privacy Act is an Exemption 3 statute. *See Painter v. FBI*, 615 F.2d 689 (5th Cir. 1980).

agencies from the disclosure provision, Section (d). Appellants' interpretation here is valid only if Section (b), to which Exemption (j) does not apply, covers both first party and third party requests. Since we are persuaded that Section (d) alone governs first party access, we must abide by the literal terms of Exemption (j) and hold that it exempts agencies from being required to disclose certain investigatory records to first party requesters.

Our conclusion is fortified by the legislative history of the Act. As we have noted, Congress expressed its concern that individuals not use the Act to gain access to sensitive criminal justice records. On the other hand, appellants have shown no examples of congressional concern that agencies be allowed to use the Privacy Act exemptions to avoid other Act requirements. We cannot ignore the clearly stated legislative intent and relegate the effect of the Act's exemptions to other provisions that apparently were less important to Congress.

Appellants also argue that various contemporary governmental interpretations of the Privacy Act contradict the government's current position. *See* OMB Report at 40 Fed. Reg. 56742-43 (1975); Justice Department Regulation at 28 C.F.R. 16.57. In response, the government notes that the Justice Department issued a letter several months after the Privacy Act was passed asserting that the Act was the exclusive avenue for first party requests, *see* Source Book at 1177-78, and that the OMB has proposed new guidelines stating that the Privacy Act is an Exemption 3 statute, *see* 48 Fed. Reg. 36359 (1983). These differing interpretations do not help us in our current task. Rather, they show only that government agencies have been confused about the interrelationship between the Privacy Act and the FOIA.

In summary, the legislative history of the Privacy Act shows Congress' concern that individuals not use the Act to obtain access to their own criminal investigative files. It makes little sense to conclude that Congress would

enact specific nondisclosure provisions in the Privacy Act to address this concern, while at the same time allowing individuals to bypass these exemptions by using the broader access terms of the FOIA.

3. *Effect of Government's Construction: Full Meaning for Both Acts*

Whereas appellants' interpretation would deprive the Privacy Act access exemptions of any effect beyond the scope of the FOIA exemptions, the government's construction allows both acts to retain their full meaning. On the one hand, agencies could refuse first party requests for the type of information described in Exemption (j), as the DEA did here. At the same time, the FOIA still would retain its vitality. For example, although FOIA Exemption 7 allows greater access to law enforcement data than does Privacy Act Exemption (j) in some instances, the FOIA exemption applies in many cases where the Privacy Act's exemption does not.[13] Exemption 7 governs any third party request, any request for documents that are not "records" within a "system of records," and any first party request for "records" that an

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[13] FOIA Exemption 7 states that:

> (b) This section does not apply to matters that are—
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> (7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel.

5 U.S.C. § 552(b)(7).

agency has not exempted from access according to the Privacy Act's requirements.

Both appellants and the court in *Greentree*, *supra*, 674 F.2d at 79-80, note that the government's construction could result in a "third party anomaly." Because third party requests under the FOIA are protected from the Privacy Act's nondisclosure provisions by Privacy Act Section (b)(2), it is possible that a third party could have access to information about an individual that the individual himself could not obtain.

Merely showing that such an anomaly might exist, however, is not sufficient. The crucial question is whether Congress was aware of this possibility and drafted the Privacy Act to prevent it from occurring. The legislative history does not show that Congress was aware that this "third party anomaly" would arise. The floor managers of the Act explained the amendment that added Section (b)(2) to the Act as follows:

> The compromise amendment would add an additional condition of disclosure to the House bill which prohibits disclosure without written request of an individual unless disclosure of the record would be pursuant to Section 552 of the Freedom of Information Act. This compromise is designed to preserve the *status quo as interpreted by the courts* regarding the disclosure of personal information under that section (the FOIA).

Source Book at 861 (Senator Ervin's explanation to Senate), 989 (Representative Moorehead's explanation to House) (emphasis added).

Under the "status quo as interpreted by the courts" at that time, third party requesters enjoyed few rights of access to records concerning other persons. The courts interpreted FOIA Exemption 6, which exempts certain files from access where disclosure would invade personal privacy, very broadly. *See, e.g.*, *White Hobby USA, Inc., v. IRS*, 502 F.2d 133 (3d Cir. 1974); *Rural Housing Al-*

liance v. U.S. Dept. of Agriculture, 498 F.2d 73 (D.C. Cir. 1974). Moreover, although Congress had amended FOIA Exemption 7 to expand access to criminal investigative records just before passing the Privacy Act, this was not the "status quo as interpreted by the courts" at that time.

Appellants also have not shown that even today the third party anomaly would arise more than rarely. As we have noted, many first party and third party requests will concern records that are not covered under the Privacy Act at all. Even where a record would be exempt from a first party request because of a Privacy Act exemption, FOIA Exemptions 6 and 7 likely would block the third party request as well.

D. Conclusion

A thorough examination of both the language of the FOIA and the Privacy Act and the relevant legislative history persuades us that the Privacy Act is a "statute" under FOIA Exemption 3. The district court properly held that because the records that Wentz and Shapiro seek are exempt from disclosure under the Privacy Act Exemption (j)(2), they may not be disclosed under a FOIA request. Since Exemption (j)(2) also covers requests for corrections, the denial of Wentz' request for correction of the allegedly inaccurate records also was proper.

Accordingly, the district court's decision granting the DEA's motion for summary judgment is affirmed.

AFFIRMED.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

SUPREME COURT OF THE UNITED STATES

No. 83-5878

ALFRED B. SHAPIRO and GREGORY J. WENTZ,
PETITIONERS,

v.

DRUG ENFORCEMENT ADMINISTRATION
RESPONDENT.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. This case is consolidated with case No. 83-1045, *United States Department of Justice, et al.* v. *Anthony Provenzano*, and a total of one hour is allotted for oral argument.

April 2, 1984

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